IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.399 OF 2006

Hindustan Petroleum Corporation Ltd. ... Petitioner

vs.

1. M/s.Hyundai Engineering &
Constructions Co. & another. ... Respondents.

Mr.M.D.Siodia with Ms.D.S.Retiwala i/b. M/s.Rustomji & Ginwala, for Petitioner.

Mr.Hiren Advani with Leon Samual & Ms.Deepti Chand i/b. Advani & Co. for Respondent no.1.

CORAM: D.K.DESHMUKH,J.

DATED: 8th November,2006..

P.C.:-

1. By this petition filed under Section 34 of the Arbitration and Conciliation Act the petitioner challenges the Award made by the learned sole Arbitrator dated 30.5.2006. By that Award the learned Arbitrator has directed the petitioner to pay certain amount to the

respondent no.1. The only question that arises for consideration in this petition is whether the construction placed on clause 59 of the agreement between the parties by the learned Arbitrator is a possible construction or not. It goes without saying that in case I find that the construction placed by the learned Arbitrator on clause 59 of the contract is a possible construction then I cannot interfere with the Award. The question that arose for consideration before the learned Arbitrator was whether the amended portion of clause 59 which relates to the relevant date for applicability of conversion rate is applicable only in relation to the Indian bidders or it applies even to the foreign bidders. The learned Arbitrator after going through clause 59 and the other relevant material on record has held that in so far as the foreign bidders are concerned they are entitled to bid in foreign currency, therefore, relevant date for conversion of the foreign currency into Indian Rupee is not relevant in their case and therefore, the amended portion of clause 59 does not apply in relation to the foreign bidders. The relevant observations in this regard are to be found in para 14, 15, 16 and 17 of the Award which reads as under:-

> "14. Both the parties have given their own interpretation or the final and cumulative result of the amendments in Clause 59. The final Clause 59 as set out by the both the parties are identical. However, while the Claimant has contended that the amended portion only applies to Indian Bidder,

the Respondent has contended that the same also applies to Foreign Bidders.

15. Considering the above provisions of Clause 59 and the three amendments, I am not in agreement with the interpretation sought to be canvassed by the Respondent. I am more inclined to agree with the interpretation canvassed by the Claimant as it is more logical and sensible. On careful perusal of Clause 59 and the amendment, I am of the view that the amended portion is only applicable to Indian Bidder and I am unable to accept the contention of the Respondent that the same is applicable to Foreign Bidders also. In my view, the first portion of Clause 59 is the only portion which is applicable to Foreign Bidders and which reads as follows:

"Payment to foreign contractor shall be made in USD for imported equipments/services in foreign countries and in Indian rupees for the equipments supply from India and services rendered in India."

16. In my opinion, the above clause is substantial and covers all aspects in so far as Foreign Bidder is concerned, it is abundantly clear that the Foreign Bidder was to be paid in US $ for any material imported or services provided in foreign currencies and in Indian rupees for any material supply from India and services rendered in India. Therefore, the situation of foreign exchange fluctuation in case of foreign bidder does not and cannot arise.

17. While considering the various provisions of the contract. It is clear that in so far as a foreign bidder was concerned, he was required to submit his bid in USD only and there was no segregation to be made by a foreign bidder as in the case of Indian Bidder, who was required to submit his bid in two components i.e. Indian rupee component for material/equipments supplied and/or services rendered within India and in USD for material/equipments supplied and/or services rendered from abroad. Thus, considering the provisions of the contract, it is abundantly clear that a foreign bidder was to be paid only in USD and therefore, the question of "foreign exchange variations" would not arise in case of a foreign bidder. This situation can only arise when payment is required to be made in Indian Rupees to an Indian bidder. To understand this, the hypothetical example given by the Advocates for the Claimant is very logical, practical and sensible. While arguing the matter, the Advocate for the Claimant had stated that if the foreign bidder had bid for in 100 USD contract, he would be paid 100 USD in that currency and hence, the question of foreign exchange in case of a foreign bidder did not arise. It will be the Respondent (Owner) who would have to obtain such foreign exchange and therefore, foreign exchange variation would be on account of the Respondent irrespective of whether the contract was completed within the contract delivery

> schedule or otherwise. On the other hand, the Indian Bidder as required to submit his bid for the foreign component in USD and bid for the Indian component in Indian Rupees – but was to be paid for both components in Indian Rupees only. Therefore, in this case, the question of foreign exchange fluctuation and variation would arise. It is to protect against this variations that the amendments are sought to be brought in Clause 59. I am in agreement with this argument of the Claimant and accept the same."

2. The learned Counsel appearing for petitioner submits that because even for making payment to the foreign bidders in foreign currency the petitioner has to purchase foreign currency and therefore, the amended portion of clause 59 would be applicable. In my opinion, the statement is not well founded. Clause 59 of the contract is relevant which reads as under:-

> "Payment to the Foreign contractor shall be made in US dollar for imported equipments/services in foreign countries and in Indian Rupees for the equipments supplied from India and services rendered in India. Payment to Indian Bidder shall be made in Indian Rupees only.
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> The payment to Indian contractor will be made in Indian Rupees only. However, the Indian

Contractor will indicate the Foreign component of the Lumpsum Price.

For equipments/ materials imported within the contractual delivery schedule, the BC selling market rate of Foreign exchange declared by the State Bank of India on the date of Bill of Entry shall be considered. In case of delay in import of equipments, the BC selling market rate applicable on the last day of delivery schedule or the date of Bill of entry whichever is lower shall be considered.

For foreign component on account of supervision, training assistance etc. the BC market selling rate if foreign exchange declared by the State Bank of India on the date of completion of such services, as the case may be, shall be considered. For his purpose a joint record shall be maintained by Owner/Contractor for identifying the date of completion of such services. However, the above provision shall be applied only within the Contracted period. In case of extension in this time schedule the BC selling market rate applicable on the last day of the contracted time schedule or the date of completion such services whichever is lower shall be considered.

The foreign currency shall be US dollar only."

It is clear from the clause 59 that the payment to the foreign bidder/contractor is to be made in US dollar for imported equipments/services and therefore, there is no question of any

conversion rate apply in relation to the payment to be made to the foreign bidders or contractor. Perusal of the above quoted clause 59 shows that even in relation to the Indian bidders if there is delay in import of equipments then Indian bidder is also entitled to get the price for which he has purchased the equipment. Only the amended portion lays down the date that will be taken into consideration for deciding the rate of conversion. Therefore, if even the Indian bidder is entitled to payment of the price of the equipment, the foreign bidders obviously would also be entitled to payment of the price of the equipment and if the equipment is purchased in foreign currency and the foreign bidder is also to be paid in the foreign currency there is no question of there being any relevant date for deciding rate of conversion. In short, the construction that is placed by the learned Arbitrator on clause 59 in any case is a possible construction, though it may be possible to place some other construction on clause 59, but that is not the ground on which the Court under Section 34 of the Act can interfere with the Award. I, thus, find that in the limited jurisdiction of this Court under Section 34 of the Act to interfere with the Award made by the learned Arbitrator, the Award cannot be interfered with. The petition fails and is dismissed. The petitioner to pay cost of this petition to the respondent no.1 as incurred by the respondent no.1.